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Nos. 10-367, 10-821

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In The
# Supreme Court of the United States

ROLAND WALLACE BURRIS, U.S. SENATOR,

*Petitioner,*

v.

GERALD ANTHONY JUDGE, et al.,

*Respondents.*

PAT QUINN, GOVERNOR OF THE STATE OF ILLINOIS,

*Petitioner,*

v.

GERALD ANTHONY JUDGE, et al.,

*Respondents.*

**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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## STATEMENT

The principal clause of the Seventeenth Amendment provides: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies." The Seventh Circuit held that this provision means what it says: when a state's Senate seat becomes vacant, that state's Governor is required to issue a writ of election to fill that vacancy. That is the *only* legal obligation the court below held that the Seventeenth Amendment imposes on the states. No other federal court has ever addressed this question.

The Quinn petition misunderstands or mischaracterizes the Seventh Circuit's opinion. That misunderstanding is the basis for the petition's expansive presentation of the decision below, as well as its suggestion of a conflict. But contrary to the suggestions in the petition, the Seventh Circuit imposed no constitutional requirements with respect to the timing of, or the procedures for, vacant Senate elections. Instead, the decision expressly states, numerous times, that *state* law controls the timing and procedural aspects of vacancy elections for Senate seats. The only obligation the Seventeenth Amendment imposes, in the view of the court below, is that the Governor must issue a writ of election. The court held that state law determines the date or range of dates for which that writ issues, as well as all other procedural aspects of that election.

1. This dispute involves who is entitled to hold a Senate seat during a narrow period of time: the lame-duck session of a sitting Congress. Illinois' Election Code already provides that a Senate vacancy can temporarily be filled by appointment until the next biennial congressional election, at which time the Senator elected "shall take office as soon thereafter as he shall receive his certificate of election." 10 ILCS § 5/25-8 (2008). The State acknowledges that this provision already requires an election to fill a Senate vacancy before the term for that office expires. Quinn Pet. at 3-4 n.1. Thus, there is no dispute that the Governor may make temporary appointments to fill vacant Senate seats and that those temporary appointments can last, at most, until the next biennial congressional election.

2. Illinois contends, however, that both its election laws and the Seventeenth Amendment permit its Governor to "temporarily" fill a vacant Senate seat through a gubernatorial appointment that lasts through the next regularly scheduled biennial election and extends all the way until a new Congress begins. Thus, in the State's view, the Governor had the legal right never to issue a writ of election to fill Illinois' vacant Senate seat. Instead, the Governor could have appointed a Senator who would serve, not just temporarily until the next regularly scheduled congressional election, but permanently, until the next session of Congress, at which a newly elected Senator would begin a new six-year term.

3. The court below rejected this claim on the basis of a careful textual reading of the Seventeenth Amendment. The court was required to construe the principal clause of that Amendment, along with its accompanying proviso. The full text of the Amendment reads:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. U.S. Const. amend. XVII para. 2.

The Seventh Circuit held that the principal clause requires the chief executive of a state to issue a writ of election to fill a Senate vacancy. The proviso permits the state legislature to authorize the governor initially to make a temporary appointment, and to regulate the manner and processes of the election to permanently fill the vacancy. The court also concluded that any temporary appointment ends when the people fill the vacancy in an election.

The court concluded that its textual analysis of the plain meaning of the Seventeenth Amendment was consistent with other directly relevant provisions in the Constitution's text. Thus, the court found its analysis consistent with the provision in Article I, Section 2 that governs the filling of vacant House

seats. Similarly, the court concluded that the Seventeenth Amendment continued the same essential structure of the provision that had governed the filling of vacant Senate seats in the original, unamended Constitution, when state legislatures, rather than the people, chose Senators. *See* U.S. Const. art. I, § 3, cl. 2.

4. The court below did not decide how long a temporary appointment to a vacant Senate seat can last under the Seventeenth Amendment. Nor did the court decide how much time may elapse between the start of a vacancy and an election to fill it. *See* Quinn Pet. App. at 20a ("we do not have before us any properly presented question about how long a temporary appointment may last under the Seventeenth Amendment, nor the closely related question how much time can elapse between the start of a vacancy and an election to fill it."); *see also* Quinn Pet. App. at 38a ("we have decided the timing of the election is not properly before us . . . "). These questions are not presented here.

Instead, Judge Wood's opinion for the Seventh Circuit decided only that the Seventeenth Amendment requires a Governor to issue a writ of election to fill a vacant Senate seat. *See* Quinn Pet. App. at 14a ("the only question properly before us is whether . . . Illinois' governor, by command of the Seventeenth Amendment, must issue a writ setting an election to fill the Obama vacancy . . . "). In deciding only this narrow question, the Seventh Circuit made clear – contrary to petitioners' suggestion – that its decision

was not in conflict with the three-judge court's decision in *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968) *aff'd without op.*, 393 U.S. 405 (1969). As the Seventh Circuit noted, *Valenti* had "nothing to say about that issue." *Id.* at 21a. Indeed, the Seventh Circuit noted that *Valenti* "could not have decided that question," because the Governor had already issued a writ of election in the *Valenti* context. *Id.*

Having concluded that the Amendment requires the Governor to issue a writ of election, the Seventh Circuit then held that state law determined the date on which that election was to take place. As the court concluded, "[s]tate law controls the timing and other procedural aspects of vacancy elections." *Id.* at 33a. The court summarized its holding in these terms: the Amendment "imposes a duty on state executives to make sure that an election fills each vacancy; it obliges state legislatures to promulgate rules for vacancy elections; and it allows for temporary appointments until an election occurs." *Id.* at 34a.

5. The State's position is that the portion of the proviso that authorizes vacancies to be filled "by election as the legislature may direct" permits the legislature to "direct" that there be no election at all, whenever the legislature concludes it would be better not to hold an election. *See* Quinn Pet. at 24-25 n.15 (arguing that this provision "surely" permits the legislature to refuse to schedule an election "where holding one would run contrary to the public interest."). The Seventh Circuit held that this position could not be squared with the Seventeenth Amendment. The court concluded that this provision empowers the

state legislature to direct the manner and timing of the election, but not to eliminate it altogether. The court held that the proviso gives state legislatures similar regulatory powers over special elections to fill Senate vacancies as the Elections Clause, U.S. Const. art. I, § 4, cl. 1, gives the states over regulation of ordinary House and Senate elections. But just as the Elections Clause does not give state legislatures the power to cancel or avoid House or Senate elections whenever the legislature concludes holding an election would "run contrary to the public interest," the proviso to the Seventeenth Amendment does not give state legislatures such power to cancel or avoid the Senate election the Seventeenth Amendment requires.

6. The State also argues that the courts should recognize a "*de minimis*" exception to the Seventeenth Amendment obligation to fill vacant Senate seats with elections. Pointing to a hypothetical situation in which a vacancy might arise just days or weeks before the expiration of a Senate term, the Quinn petition continues to assert that there are at least some contexts in which it would be "impossible" to hold a valid, organized election. Quinn Pet. at 27. In such a case, Illinois asserts, the Seventeenth Amendment should not require the State to hold an election.

But as petitioner concedes, the Seventh Circuit recognized the possibility that in some other extreme context that has never been litigated and that was not before it in this case – such as a vacancy that occurs with only days left in a Senate term – a *de*

*minimis* exception to the constitutional obligation might be appropriate. Quinn Pet. at 8; *see also Jackson v. Ogilvie*, 426 F.2d 1333, 1336 (CA 7 1970); (recognizing such an exception in context of constitutional obligation to fill vacant House seats by election). The Seventh Circuit held, however, that the lame-duck session of a Congress is not a *de minimis* period of public service so devoid of substantive policymaking decisions as to justify an exception to the obligation the plain text of the Seventeenth Amendment imposes. In the most recently completed lame-duck session – the one at issue in this litigation – the Senate ratified the START arms-control treaty with Russia, approved major tax and fiscal policy legislation, repealed the "Don't Ask, Don't Tell" statute regarding military service, approved the 9/11 first responders bill, approved new food-safety legislation, and rejected major immigration reform in the proposed Dream Act. This record is ample confirmation of the Seventh Circuit's conclusion that, whatever the scope of a judicially-created *de minimis* exception to the Seventeenth Amendment might be, the lame-duck session of the Senate cannot fall within such an exception.

## REASONS THE PETITIONS SHOULD BE DENIED

This case is moot. The special election at issue has occurred and the elected Senator has served his term. Nor do the issues or the parties meet the standards required to demonstrate that an exception

to mootness is warranted under this Court's "capable of repetition, yet evading review" requirements.

Moreover, there is no conflict between the courts of appeals on the actual holding of the court below. The Seventh Circuit correctly held that the plain language of the Seventeenth Amendment requires a Governor to issue a writ of election to fill a vacant Senate seat. No other federal court has ever addressed this question, let alone held to the contrary. Indeed, petitioners identify only two federal court decisions that have ever even *discussed* the meaning of the Seventeenth Amendment regarding whether the Amendment requires an election to fill a vacancy. But no conflict exists between these two decisions and the Seventh Circuit opinion. In the absence of any conflict among the lower courts or between this Court and the decision below, review by this Court would be premature.

Finally, the Burris petition should be denied on jurisdictional and other grounds.

## I. THE PETITIONS SHOULD BE DISMISSED AS MOOT

The special election that the Seventh Circuit required to fill Illinois' vacant Senate seat for the lame-duck session of the 111th Congress has taken place. The elected Senator has fully served out his term. The petitions are therefore moot. Nor does this case fit the exception to mootness for cases capable of

repetition, yet evading review. That "exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

First, a legal challenge regarding whether the Seventeenth Amendment requires a Governor to issue a writ of election to fill a vacant seat does not involve an issue that is inherently of such a nature or duration as to be too short to be litigated fully in most contexts. President-elect Barack Obama resigned his Senate seat with two years and 48 days remaining in his Senate term. During those two years, the District Court issued one published memorandum opinion and an order denying respondents' request for a preliminary injunction; the Seventh Circuit issued a full opinion holding that the Governor was required to issue a writ of election but affirming the denial of the preliminary injunction; petitioners moved to amend the opinion or for rehearing; the Seventh Circuit issued a modification to its original opinion; petitioner Burris sought a stay from the Seventh Circuit and from Justice Breyer, all of which were denied; the case was remanded to the District Court, which held five days of hearings and then issued a second published memorandum opinion, this time specifying the details of the special election; and the Seventh Circuit issued a second full opinion on the

merits affirming the District Court's most recent decision. The time scale involved and the number of hearings, appeals, decisions, and full opinions issued in this case make clear that this issue is not by its nature "too short to be fully litigated prior to cessation or expiration."

Indeed, the State itself delayed seeking this Court's review. The initial opinion of the Seventh Circuit was issued on June 16, 2010. Instead of seeking review of that decision, the Governor sought a rehearing, which was denied on July 22, 2010. At that time, there was ample time to seek a stay from this Court and to seek review on an expedited basis. Instead, the state delayed seeking review, then sought and was granted an extension of time by this Court until December 19, 2010 to file its certiorari petition.

Second, and even more importantly, there is no basis to support a reasonable expectation that "the same complaining party will be subject to the same action again." Indeed, in the 98 years since adoption of the Seventeenth Amendment, Illinois has been faced with the need to appoint a Senator only three times, including the context at issue here.[1] For Illinois to be subject to "the same kind of order in the future," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), a Senate vacancy would have to arise; state legislation would have to continue to give the Governor the

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[1] http://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm

power to fill that vacancy through a temporary appointment; and a future Illinois Governor would have to decide he or she preferred to fill that vacancy with an appointment that ran all the way until the start of the next Congress, rather than until the next election.

This is much too remote and speculative a basis, under this Court's decisions, to support invoking the narrow exception to the mootness doctrine. "The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the [requirements for the capable-of-repetition exception to mootness]." *Murphy v. Hunt,* 455 U.S. 478, 482 (1982). Instead, the Court has required a "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same [parties]." *Id.* At this point, this "case" is about "an abstract dispute" of law. *Alvarez v. Smith,* 130 S. Ct. 576, 580-81 (2009). "And a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Id.* That is this case.

Finally, that Burris will never be in the same position again is virtually certain. Thus, his petition, too, is moot.

## II. NO CIRCUIT CONFLICT EXISTS AND REVIEW BY THIS COURT WOULD BE PREMATURE

This case is the only occasion on which any court at any level has considered whether the Seventeenth Amendment requires a state's governor to issue a writ of election when a vacancy occurs in one of that state's Senate seats. Petitioners' contention that the Seventh Circuit's decision conflicts with this Court's affirmance in *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), *aff'd without op.*, 393 U.S. 405 (1969) and with *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982) is thus wrong. Neither case decided – or even litigated – the question of whether the Seventeenth Amendment requires a Governor to issue a writ of election to fill a vacant Senate seat.

In *Valenti*, the New York statute expressly commanded the Governor of New York to issue a writ of election when a vacancy occurred in the Senate. Moreover, Governor Rockefeller had issued that writ in August, 1968 and had set a special election for November, 1970. Quinn Pet. App. at 21a. Thus, the three-judge court was not called upon to decide whether the Seventeenth Amendment requires a governor to issue a writ of election to fill a vacant Senate seat.[2]

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[2] As it turns out, for a reason never explained, the State of New York ignored Governor Rockefeller's writ of election and did not actually conduct a special election in November, 1970. But the lack of such an election was neither litigated nor blessed by either this Court or the three judge court.

Instead, the only issue actually decided in *Valenti* was the timing of that election. Robert Kennedy had been assassinated on June 6, 1968. Filing suit in July, 1968, the plaintiffs contended that the Seventeenth Amendment required his Senate seat to be filled at the November, 1968 general election. New York law, however, provided that if such a vacancy arose less than 60 days before the state's regularly scheduled primaries, the vacancy would be filled at the next general election. *Valenti* held that this state law did not violate the Seventeenth Amendment; New York was not constitutionally required to fill the vacant seat at the November, 1968 elections, when so little time had been available between the vacancy and those elections. Under *Valenti*, New York could constitutionally delay the vacancy election until November, 1970.

The Seventh Circuit did not confront a situation in which Illinois clearly stated that no special election to fill a vacant Senate seat should occur if that vacancy *arose* less than some number of days before the next regularly scheduled general election. Indeed, President-elect Obama's seat became vacant nearly two years before the next regularly scheduled general election. Instead, Illinois law provides simply that a vacant Senate seat is to be filled at the next general election. 10 ILCS § 5/25-8 (2008). The Seventh Circuit held that, when state law requires a vacant Senate seat to be filled at a specific general election, the elected Senator takes office as soon as the election result is certified. That holding is also consistent with the New York statute at issue in *Valenti*; that statute provided that the governor's temporary appointment

to fill the seat was effective only until December 1, 1970. *See Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 11 n.11 (1982) (citing *Valenti v. Rockefeller*, 292 F.Supp. 851, 853 (SDNY 1968)).

The Seventh Circuit did not hold that the Seventeenth Amendment requires a state to hold an election immediately or "as soon as practicable" or anything similar. Instead, the court held that the Amendment requires the Governor to issue a writ of election; state law determines the date on which that election takes place; when state law sets that election date as the next general election, the newly elected Senator must be permitted to assume the vacant seat as soon as the election results are certified. That holding is not in conflict with *Valenti*. Indeed, the Seventh Circuit analyzed *Valenti* and made clear its own view that its decision was consistent with *Valenti*. Quinn Pet. App. at 20a-21a.

The petitions also assert that the decision below conflicts with this Court's decision in *Rodriguez v. Popular Democratic Party,* 457 U.S. 1 (1982). But *Rodriguez* did not involve the meaning of the Seventeenth Amendment at all, nor did it involve a United States Senate seat. Rather, the decision upheld the right of Puerto Rico, as against an equal-protection challenge, to enact a statute to permit the political parties to fill vacancies in the Puerto Rico legislature without Puerto Rico holding any special election. This Court held that there is no fundamental right to vote to fill a vacant state legislative seat. The Seventeenth Amendment's "shall issue writs of election" language

was not in issue. The decision below, of course, does not recognize any fundamental right to vote to fill a vacant Senate seat, but instead applies the language of the Seventeenth Amendment in the specific context of filling a vacant Senate seat.

*Rodriguez* noted that the Seventeenth Amendment permits a state to authorize its Governor to make a temporary appointment to fill the vacant seat. But there is nothing controversial in that, nor is there anything in the Seventh Circuit's decision that takes issue with that obvious fact.[3]

Thus, there is no conflict between the Seventh Circuit's holding in this case and that of any other court. The Seventh Circuit's decision is the first and only decision on the meaning of the Seventeenth Amendment's command to governors to issue writs of election.

Perhaps recognizing the weakness of its claim of a purported conflict, the Quinn petition alleges that the Seventh Circuit's decision conflicts with election laws in 13 States. But for two reasons, this untested assertion does not provide an adequate justification

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[3] In *Rodriguez*, this Court, referring to *Valenti*, commented "that the Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate." 457 U.S. at 11. But since those were not the facts of *Valenti*, that statement was mere *dicta* and can hardly be taken as a reasoned analysis by this Court of the "shall issue writs of election" language as undertaken by the Seventh Circuit here.

for certiorari. First, none of the cited states is in the Seventh Circuit. *See* Quinn Pet. at 17 n.6. Thus, the Seventh Circuit's decision does not directly control the constitutional question with respect to any of these statutes. Should any of those statutes be challenged, other federal courts will have the opportunity to examine the precise meaning of the relevant state statute; to decide whether to come to similar or different conclusions from the Seventh Circuit regarding the constitutional question; and, if the later court reaches the same legal conclusion as the Seventh Circuit, to decide how that conclusion should be applied in the context of that particular state statute. Once again, it would be premature for this Court to intervene on the basis of speculative assertions about how the Seventh Circuit's decision would apply in states outside that circuit, should the issue ever get litigated in those other states.

Second, the actual meaning of these various state statutes for filling Senate vacancies has never been judicially tested. Senate vacancies arise in myriad circumstances, ranging from the start of a new term to its end. The manner in which these 13 state statutes would apply to the filling of vacant Senate seats, under a variety of specific circumstances – including the amount of time remaining in the term when the vacancy occurs – can only be guessed at outside an actual case that tests that question concretely.

Moreover, the other states' statutes vary widely from Illinois' statute and from each other. For example, California Elec. Code § 10720 provides that the

appointee shall serve out the term "unless the vacancy is filled at a special election held prior to the general election," a provision not included in the Illinois statute. Connecticut Gen. Stat. Ann. § 9-211 provides that the appointee shall serve out the term only if the vacancy occurs less than 62 days before the next election. Maryland Code Ann., Elec. Law § 8-602 allows the appointee to serve out the term only "if the vacancy occurs after the date that is 21 days before the deadline for filing certificates of candidacy for the election that is held in the fourth year of the term."

None of these statutes has been tested in a lower federal court against the command of the Seventeenth Amendment or in any particular fact situation. The meaning of these statutes, their application in the various contexts in which vacancies might occur, and the way in which federal courts of appeals would ultimately rule on the Seventeenth Amendment question with respect to any of these applications is completely speculative. In addition, states have been moving away from appointments and to early special elections to fill Senate vacancies. Massachusetts and West Virginia have done so recently to fill the vacancies created by the deaths of Senators Ted Kennedy and Robert Byrd. There is no need for this Court to grant certiorari based on such speculative assertions about the meaning of other, untested state statutes – some of which are being changed or eliminated – from states outside the Seventh Circuit.

## III. THE BURRIS PETITION SHOULD BE DENIED ON JURISDICTIONAL AND OTHER GROUNDS

Petitioner Burris seeks a prejudgment writ of certiorari based on a district court opinion entered on August, 2, 2010. His petition expressly asserts jurisdiction only under Rule 11 of this Court and 28 U.S.C. § 2101(e). Justice Breyer denied Burris' application for a stay pending the filing and disposition of a petition for a writ of certiorari before judgment. After the filing of that petition, however, the Seventh Circuit on September 24, 2010, issued a final decision in the appeal from that district court decision. The Seventh Circuit affirmed the district court decision at issue in Burris' appeal. Thus, there is no longer any jurisdictional basis under Rule 11 and 28 U.S.C. § 2101(e) for Burris' pending petition.

Rule 11 applies to "review a case pending in a United States court of appeals, *before* judgment is entered in that court." Sup. Ct. R. 11 (emphasis added). Similarly, the jurisdictional statute Burris invokes empowers this Court to grant a writ of certiorari "before judgment has been entered in" the court of appeals. Once the Seventh Circuit rendered judgment in Burris' appeal, these jurisdictional bases for seeking review of *the district court's opinion* under Rule 11 and 28 U.S.C. § 2101(e) evaporated. If Burris now desires to have this Court review the opinion of the Seventh Circuit affirming the district court's decision, the proper course was for Burris to file a timely petition for certiorari to the Seventh Circuit under 28 U.S.C. § 1254(1).

Instead, Burris has filed what he calls a "Supplemental Brief" describing the "impact" of the Seventh Circuit's decision on his Rule 11 petition. This "Supplemental Brief" does not assert any new jurisdictional basis for his petition. Thus, Burris' petition still seeks review of the *district court's decision* under Rule 11 and 28 U.S.C. § 2101(e). But because the Court of Appeals has now rendered judgment, there is no longer any jurisdictional basis in either of those provisions for Burris' petition.

Even assuming Rule 11 still applies to Burris' petition, that petition is certainly not of "such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Burris' petition challenges the rules and procedures the state of Illinois used to conduct a special election on November 2, 2010 to fill out the remaining term, until January 3, 2011, of the Senate seat that had become vacant when President-elect Obama resigned from that seat. That special election has taken place already; the candidate who won that election, Republican Mark S. Kirk, has already finished serving out the entire term at issue. The 112th Congress is now seated. Thus, none of the circumstances that justify certiorari before judgment in the Court of Appeals is present here. Burris' effort to stop that election or have it conducted under other rules is now moot and makes all the more inappropriate any exercise of this Court's extraordinary jurisdiction under Rule 11 and 28 U.S.C. § 2101(e).

Finally, to the extent Burris' Rule 11 petition and "Supplemental Brief" might be treated as a petition for certiorari under 28 U.S.C. § 1254(1), the petition should be denied. Not only is Burris' petition moot, but the questions it presents are also not worthy of this Court's exercise of its discretionary jurisdiction. Those questions involve the unique circumstances and procedures under which Illinois conducted its special election to fill its vacant Senate seat. The courts below looked to Illinois law and procedure to determine the appropriate ground rules under which that election should be conducted, given the unique time pressures involved. If federal courts ever order another election to fill a vacant Senate seat, there is no compelling reason to assume the circumstances will be identical to those in this case. Thus, the issues Burris presents are too fact bound and unique to warrant a grant of certiorari.

## IV. TO THE EXTENT THE PARTIES DISPUTE MOOTNESS, THE COURT SHOULD SIMPLY DENY CERTIORARI

In a case like this one, in which there are multiple grounds for denial of further review, including mootness and lack of a sufficient basis on the merits to warrant a grant of certiorari, the proper course is to deny the petition for certiorari. As the leading treatise on Supreme Court practice notes: "[O]bservation of the Court's behavior across a broad spectrum of cases since 1978 suggests that the Court denies certiorari in arguably moot cases unless the petition

presents an issue (other than mootness) worthy of review." E. Gressman et al., *Supreme Court Practice* (9th ed. 2007), at 939, n.33. The Court should follow that practice here and simply deny certiorari.

When the parties disagree about mootness – as is the case here – but the case is otherwise not worthy of a grant of certiorari, there is little reason for the Court to waste its limited judicial resources on resolving the mootness issue. As is the case here, that issue can be highly dependent on factual issues that the parties dispute. Because the underlying questions are not worthy of certiorari review, the Court should simply deny the petitions.

## CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petitions.

Respectfully submitted,

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